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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1299~~ 103

LOUIS M. RAY,

Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

NO._____

LOUIS M. RAY,

Petitioner,

versus

UNITED STATES OF AMERICA

Louis M. Ray, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit heretofore rendered herein.

1.

OPINIONS BELOW

The opinion of the Court of Appeals has not been officially reported. The judgment was entered on March 23, 1967, and petitioner has not made an application for a rehearing. A copy of the opinion is annexed as Appendix A (infra pp. ____ through ____).

2.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

3.

QUESTIONS PRESENTED

The sole question here presented is whether a search and seizure conducted by agents of the Small Business Administration, an agency of the United States (hereinafter referred to as SBA), with respect to the records of several corporations at the office of the accountant for a third-party corporation without a search warrant or any other investigative order constituted an illegal search and seizure in violation of the provisions of the Fourth Amendment to the Constitution of the United States.

In passing upon this point, the following questions are presented:

(a) If the Government has, under the Small Business Investment Acts (15 USC 661-696) and applicable regulations (13 CFR 1966, Supp. 42, Sect. 107.801), the right to examine at any time, without a court order or an order of investigation, an SBA licensed finance company, can this be done over the express objection of the president and principal stockholder of the company being examined? Ancillary to this, and assuming the Government possesses herein the right of examination, is the question whether or not it is limited to the office space usually and customarily occupied by the SBA company, or whether it extends to other offices owned by a corporation other than the SBA licensee and used and occupied by that company's retained accountants.

(b) Does the right to look at and examine the records of an SBA licensed company without a search warrant or other authority include the right to examine third-party corporate records which "to some extent, were commingled" (Court of Appeals opinion) with the records of the SBA company? The third-party records consisted of bank statements contained in an office supply type voucher box, with the name of the company clearly printed or typed across the top of each statement, in which was also contained similarly marked statements of the SBA company.

4.

STATUTES AND REGULATIONS INVOLVED

The following statutory provisions giving SBA the right to investigate companies licensed by it is annexed as Appendix B: Section 310 of the Small Business Investment Companies Acts (15 USCA 687b); subsections (a), (b), (c) and (d) of Section 107.801 of Rules and Regulations governing Small Business Investment Companies (26 Fed. Reg., p. 8240, August 31, 1961).

5.

STATEMENT

Petitioner, Louis M. Ray, organized in 1961 a corporation known as First Louisiana Investment Corporation (hereinafter referred to as FLIC) and served in the capacity of principal stockholder and president.

During 1962 and early 1963, FLIC borrowed from SBA some $450,000.00 pursuant to the provisions of the Act of Congress covering such loans (15 USCA 682-686). In April, 1963, FLIC applied through petitioner Ray for another loan from SBA by reason of it having obtained additional private source capital. As a result, officials of SBA sent two field examiners to Monroe, Louisiana to check the books and records of FLIC. No administrative order of investigation was entered by SBA prior to the arrival of the examiners on June 7, 1963, as provided for by Section 310 of the Act (15 USCA 687b). Apparently, at the outset, a routine examination of FLIC's records was contemplated in connection with its application for an additional loan.

FLIC had its office in two rooms in the rear of the ground floor of an office building bearing Municipal No. 228 South Grand Street, Monroe, Louisiana, which was owned by First Investment Corporation, an entirely different realty corporation from FLIC. There were some five or six offices on this floor, all connected by a public passageway. One of these offices was leased to the Department of Highways of the State of Louisiana, another was leased to Scarborough Bail Bonds, and the remaining offices used by various individual and corporate associates of Ray.

On the early afternoon of June 7, 1963, SBA Agents Schutz and Moore from Washington, D.C. appeared at the reception room of the office building, showed their official badges as representatives of SBA to a male clerk-typist in Ray's employ by the name of Sims, and demanded to see and examine all the records of FLIC. Ray was in Florida on a business trip, and Sims refused to let the examiners see the records except with

Ray's approval. Ray was contacted over long distance telephone in Florida, and he refused to permit the examination. He told Schultz they could not look at the records until he returned to Monroe. Thereafter, while Sims was talking to Ray about other matters, the two agents left the suite of offices occupied by FLIC (numbered 107) and proceeded into the hallway and into office 105, which was the front office of a two-room suite containing various accounting and bookkeeping paraphernalia. They then proceeded into the rear of these two offices and immediately began examining not only the records of FLIC, *but all the records of various other third-party corporations.* When Sims found them in the office, they were in the process of examining all the records. Sims says he asked them not to do so, which is denied by the agents.

The suite comprising office 105 was used and occupied by Gentry & Williams, accountants employed by First Investment Corporation, who were not present at the time. One closed FLIC journal was behind Gentry's desk on the floor. The records of the other companies comprising bank statements were across the room in voucher boxes on the floor, which contained divider strips with clearly marked tabs across the top of each statement showing the name of the company, such as "Holiday Hotels; Trend Builders, Inc.; Louisiana Brick Company, Inc.", etc. Neither agent Schutz or Moore had a search warrant and, again, we repeat, no official order of investigation had been entered under Section 310 of the Act at this time (15 USCA 687b). This was not done until June 14, 1963, or seven days after the search was made and the evidence indicating violations of the law had been un-

covered. The examination of all records found in the rooms by Schutz and Moore continued for the remainder of the afternoon until Sims closed the office at or about 5:00 P.M. The agents tried to return the next day, but admittance to the premises was refused by Sims.

As a result of this search of the records of the third-party borrower and other corporations, evidence was obtained which was not then known to SBA and which eventually resulted in Ray being indicted for using the mails to defraud on seven counts by a U. S. Grand Jury in Washington, D.C. on August 17, 1964. The indictment was transferred to the U. S. District Court for the Western District of Louisiana for trial. Motion to Suppress the evidence obtained by the agents on June 7, 1963 was filed and overruled by the lower court. On October 12, 1965, Ray was tried and found guilty on all seven counts. He was sentenced to serve fourteen months in prison. On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed.

6.

REASONS FOR GRANTING THE WRIT

The writ herein sought by petitioner Ray[1] should be granted for the following reasons:

---

[1]The standing of Ray to raise objection to the search by reason of the fact that corporate rather than individual records were involved appears to have passed out of the case. See *Jones v. U.S.*, 362 U.S. 257 80 S.Ct. 725, 4 L.Ed. 697 (1960) and *Henzel v. U.S.*, 296 F.2d 650 (5th Cir. 1961).

A.

The decision of the Court of Appeals is that no illegal search and seizure was ever in fact made. The holding is based altogether on the admitted right on the part of SBA to examine FLIC in accordance with the various SBA Acts of Congress and the regulations adopted thereunder. We concede the Government had the right to examine the records of FLIC, but certainly not by forcible entry and search over the express objections of the president and principal stockholder of the company. The Government has heretofore relied upon. *In re Sana Laboratories, Inc.*, 115 F.2d 717 (3rd Circuit 1940) to sustain its position that FLIC by agreement consented to the examination of its records, as long as the examination was made during regular business hours and without force or deception. But in *Sana* the agents were freely admitted to the premises by the janitor who was in charge of the building, whereas here the owner and caretaker both objected to the search conducted by Schutz and Moore. We contend that the holding applicable here is that of Judge Learned Hand in *United States v. Kraus*, 270 F. 578 (Dist. Ct. N. Y. 1921). There a forcible entry was made on premises of wholesale liquor dealers who held basic alcohol permits from the Government requiring them to keep records. The Government urged consent by agreement to the search that was made to justify the seizure of information. In passing upon the question of consent, Judge Hand has this to say, citing the two leading illegal search and seizure cases of *Weeks v. U. S.*, 232 U.S. 383, 34 Sup. Ct. 341, 58 L.Ed 652, and *Silverthorne Lumber Co v. U. S.*, 251 US. 385, 40 Sup. Ct. 182, 64 L.Ed. 319:

> "It is quite true that the officers had the right to inspect the records, and therefore the right to enter the place where they were kept. I shall for argument's sake further assume that, if the records were not kept as required, they had the right to inspect such other papers on the premises as recorded transactions which should have been transcribed into the records. It does not, however, follow from these concessions that they had the right to break and enter, though the petitioners wrongfully refused to allow them to inspect, nor does it either follow that they had the right to seize the records and papers after an inspection."

Several people were indicted in *Kraus,* and in passing upon defendants' motions for the return of the papers illegally seized, Judge Hand's decree was:

> "The petitions are therefore disposed of as follows: The respondents may notice for trial in the case of any one of them the issue *whether the search was made with the consent of the person having actual possession of the premises, or of someone authorized by him.* In any case in which the issue goes against respondents, or in which they do not choose to go to trial, an order will pass directing them to return all documents seized by them, and copies of the same . . ." (Emphasis ours)

The Court of Appeals finds as a fact herein that "Ray refused to permit any examination until his return from Florida . . .", and the caretaker, Sims, says he strenuously objected to the examination. The truth is

that no consent was given, and, in fact, Schutz and Moore were expressly denied the right of entry and search.

Certainly, "forcible entry" as used in these decisions does not literally mean a breaking and entering. On arrival Schutz and Moore exhibited to Sims their identification cards showing them to be agents of the United States. He told them they could not see the records, and this was confirmed by the owner over the telephone. Forcible entry is defined (22 Am. Jur. "Forcible Entry", pg. 906) as:

> ". . . an entry on real property peaceably in the possession of another, against his will, without authority of law, by actual force, *or with such an array of force and apparent intent to employ it for the purpose of overcoming resistance that the occupant in yielding and permitting possession to be taken from him must be regarded as acting from a well-founded apprehension that his resistance would be perilous or unavailing.*" (Emphasis ours)

When the agents, nevertheless, made an examination of not only FLIC records, but the other corporations, Sims said: "I tried to call Mr. Ray again, and I couldn't get in touch with him, and I didn't know whether to call the police, or what to do. Maybe they were something like the FBI. I didn't know what to do." (Sims, Record Civil Case No. 9587, p. 106-7). See also Sims' detailed affidavit (Tr. 36-38).

We submit that under these circumstances, the examination of FLIC records under *Kraus* and *Silver-*

thorne, supra, was a forcible examination and, therefore, an illegal and unreasonable search and seizure in contravention of the provisions of the Fourth Amendment.

The point is this: With all the contracts and agreements which FLIC had to sign with the Government in order to obtain an SBA license, the Government agents could have obtained (when Ray refused to let them examine the records) a court, or administrative, order in a matter of hours, permitting them to examine all pertinent records. We submit a lawful and orderly proceeding requires it. This they refused to do. If such an examination, made over the express objection by the owner, is countenanced, just how far can Government agent go in a case of this sort? The FLIC offices and other offices of Ray's associated companies were on private property. The books and records examined were all private, not public, papers. The Government has argued all the way through these proceedings that no force was used, but exactly what was Sims supposed to do? Both agents were already in the process of actually examining private records in the adjoining private suite by the time Sims finished his phone conversation with Ray in Florida. Was Sims at liberty to throw them out or have them ejected by the police? We submit he was, but the Court of Appeals decision is to the contrary, and Sims certainly could not be expected, under the circumstances, to make any further resistance to the agents' asserted authority.

We think Congressional intent is of utmost importance herein. Did Congress intend that SBA Agents should have the right to proceed forthwith with an examination over the express objections of the owner

and when they had been denied entry to the premises? Under the clear provisions of the Act it did not. Section 310 (Appendix B) gives the Administration the very broad powers to subpoena witnesses and to "require the production of any books, papers and documents which are relevant to the inquiry . . .", and then goes on to say that in the case of "refusal to obey" a subpoena, the Administration had the right to "invoke the aid of any court of the United States" in order to require the production of the books and papers sought to be examined. It provides further that thereafter (presumably after a full hearing) any such court "may" issue an order requiring such person to produce records. It is clear, therefore, that Congress intended that when an examiner is refused the right to examine records of an SBA licensed company, it is then obligatory upon the administrator to stop and seek the aid of the courts, and not attempt to take the law into his own hands as was done here.

If the agents had a right to examine the records of FLIC without a court order and despite the owner's prohibition, we submit, under applicable law, it was limited to the offices occupied by FLIC and those in which it normally kept and maintained its records. These offices comprise Suite 107, and not Suite 105. While Gentry & Williams did accounting work for FLIC, they also worked for other companies of Ray, and the space where the records were found constituted their private offices. They did outside accounting work for third parties in these rooms. The Government contends that all of these offices (except the La. Highway Dept. space and the bail bond office) were in effect occupied by FLIC, and is referred to in Government briefs as one ball of wax. We do not agree,

and this contention is not supported by applicable decisions, *Holzhey v. U. S.*, 223 F.2d 823 (Fifth Circuit, 1955) nor has it received the sanction of either the district or appellate courts herein.

B.

Last, but certainly most important of all, is the point that, conceding for purposes of argument, the Government agents had the right under applicable regulations to examine all of FLIC's records, they had no right to examine the private records of other corporations over the express objection of the owner and without a search warrant.

Ray's indictment arises from information contained in the records of the third-party companies and those same illegally searched records were in part presented to the Grand Jury by the U. S. Attorney in Washington. The Court of Appeals states the problem as follows: "A more serious question exists as to the validity of the exmination of the records and documents of corporations which were controlled by Ray and used by him in illegal transactions with FLIC", and then goes on to say as the sole basis of its judgment that these records were "to some extent, commingled" with FLIC records.

We concede the bank statements of the borrower corporations were in standard voucher boxes on the floor of the rear office of Suite 105. Statements of FLIC were contained in only one of the boxes. The records of each corporation were kept in a separate section of the voucher box with clearly marked, typed tabs folded across the top of the bank statement so that it would be

unnecessary to either remove the statement from the box or to open them to determine they were not records of FLIC. Schutz admitted he had no trouble prior to opening the statement in determining which company the statement belonged to. The third-party bank statements were not commingled in the usual sense — that is, checks and ledger sheets of FLIC were not placed together in an envelope or statement with those of other corporations. The arrangement of the voucher box was clearly analogous to that presented by the arrangement of files of different clients contained in the standard type metal filing cabinet used by most lawyers, accountants, doctors and other professional practitioners.

Inasmuch as the private records were not commingled in fact with the records of FLIC, clearly the Government had no right to examine the records of the other corporations having no connection with SBA. The law is so obvious on this point, there are few decisions on the subject. In *Cooper's Express, Inc. v. Interstate Commerce Commission*, 330 F.2d 338 (First Circuit, 1964), agents of the Interstate Commerce Commission, while making an examination of a carrier's records which were required to be kept, attempted to search through papers in the desk of the company's office manager. On appeal the Government conceded its agents had no right to "ransack or make a general search of appellant's premises nor the right to open appellant's desk without permission.' In passing upon the Government's concession, the court says: "Agent Shea's arrogant attempt to extend the scope of the inspection and examination was disavowed by the Commission", and goes on to hold that the examination of the records required to be kept alone was legal. In

that case the examination was being conducted with the full consent of the owner. Nowhere can we find, nor has the Government cited, any cases permitting the Government, under the circumstances and facts here involved, to search through the private records of the other corporations. Where the point has been raised, it has been conceded that no such search is permissible under the Fourth Amendment.

The Court of Appeals cites in principal support of its decision that the right to examine FLIC's records includes the right to search through the records of the borrower companies. *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L.Ed. 2d 668. But in *Abel*, the Government had an immigration administrative arrest warrant against defendant when they entered his room and searched the premises, during which they uncovered evidence of espionage upon which Abel was later convicted. The search although commenced under authority derived from immigration regulations, was held to be a valid disclosure of unlawful espionage activities by that same suspect. But here, the only authority of SBA was that granted by the SBA Acts and applicable regulations to examine the records of FLIC. *Abel* is, we submit, not authority for the Government to carefully search through the clearly marked and defined private records of the various other corporations with which SBA had no contractual relationship whatever and to which SBA had not right under the regulations. Again, and we repeat, the entire search was made over Ray's express refusal to permit examination until he could return to Monroe.[2]

---

[2]Ray returned to Monroe later on and let the examiners examine all the records of FLIC.

7.

CONCLUSION

If the decision of the Court of Appeals is permitted to stand, then we submit the very broad right of examination held by literally hundreds of Government agencies over the books, records and affairs of private individuals and corporations means that such examinations may hereafter be conducted over (a) the express objections of the owner or those in charge of the premises where the records are kept, with the implication that, if necessary, force could be used to carry out the examination, and that (b) such a search permits the lawful examination of the records of all other corporations whose private records happen to be in the same area, office, or filing cabinet with the records of the corporation subject to examination, regardless of the ownership, control or occupancy of the premises, and even though the private corporations are in no manner under government control by contract or otherwise.

The Fourth Amendment provides in pertinent part that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . .", and, we submit, for the reasons stated, prohibits the search of the private offices at 228 South Grand Street, Monroe Louisiana, which was made in this case by SBA agents on June 7, 1963.

For the reasons stated above, we respectfully submit the writ sought herein should be granted.

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CERTIFICATE OF SERVICE

I, JAMES D. SPARKS, attorney for Louis M. Ray, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18 day of April, 1967, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the following parties:

1. On the Solicitor General of the United States, by mailing a copy to him in a duly addressed envelope, with air mail postage prepaid, at the Department of Justice, Washington 25, D.C.

2. On Edward L. Shaheen, Unted States Attorney, by mailing a copy to him in a duly addressed envelope, postage prepaid, at 408 Federal Building, Shreveport, Louisiana.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23140

LOUIS M. RAY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(March 23, 1967.)

Before JONES, WISDOM and GOLDBERG, Circuit Judges.

JONES, Circuit Judge: The Small Business Administration, created by Congress, is an agency of the United States and is known in Federal jargon as S.B.A. To stimulate the national economy and, in particular, the small-business segment thereof a program was set up in S.B.A. to supply such financing for small businesses as might not be otherwise available in adequate supply. 15 U.S.C.A. § 671. The act of Congress provided that small business investment com-

panies, chartered under state law, having articles of incorporation approved by S.B.A. might be issued a license to operate under the Federal act. 15 U.S.C.A. § 681 et seq. S.B.A. is authorized to purchase the debentures of small business companies and to make loans to and acquire the obligations of such companies. Small business investment companies are authorized to finance or refinance small-business concerns to the extent permitted by and subject to the limitations of the statue.

S.B.A. like most, perhaps all agencies of the United States, is empowered to prescribe regulations, and in particular has authority to prescribe regulations governing the operations of small business investment companies. By statute it is provided that "Each small business investment company shall be subject to examinations made by direction of the Administration [S.B.A.] by examiners selected or approved by the Administration . . . ." 15 U.S.C.A. § 687(c). The S.B.A. Regulations contain the following:

> "(a) Each licensee shall be subject to examination by S.B.A.
>
> "(b) Such examinations shall cover any and all matters as determined by S.B.A., and shall be conducted by S.B.A. examiners or by any examiners selected or approved by S.B.A.
>
> * * * *
>
> "(d) The time and manner of conducting any such examination shall be determined by

S.B.A. in each case." 13 CFR 1966, Supp. 42 § 107.801.

The appellant, Louis M. Ray, was the organizer, principal stockholder and the managing officer of First Louisiana Investment Corporation, herein called FLIC. It was licensed by S.B.A. as a small business investment company. Its place of business was in Monroe, Louisiana. On June 7, 1963, two S.B.A. examiners, Messrs. Schutz and Moore were in Monroe for the purpose of conducting an examination of FLIC. S.B.A. had previously received information which suggested that the operations of FLIC were not being conducted as the law required and that other corporations, controlled by Ray, might be involved in prohibited transactions with FLIC. Before going to the FLIC offices, the examiners went to the court house where they obtained additional information about some of the Ray controlled corporations which furnished further grounds for a belief that FLIC was not being operated in a lawful manner.

At the FLIC offices the examiners found J. D. Sims, a clerk and typist of FLIC. The examiners identified themselves. Sims told them that Mr. Ray and Mr. Gentry, his accountant, were in Florida and he could not show them the FLIC records. Sims got Ray on the telephone and Schutz stated who he was and his purpose. Ray refused to permit any examination until his return from Florida. Schutz gave the telephone back to Sims who talked further with Ray. While Sims was on the telephone, the examiners crossed a corridor to an office of Gentry and his partner Williams which was used almost entirely for handling the business of FLIC and other corporations controlled or dominated

by Ray. There on the floor the examiners found journals and ledgers of FLIC and they proceeded to examine them. From the testimony of Schutz it would appear that Sims acquiesced in the examination. From the testimony of Sims it would appear that he strenuously objected to the examination. We do not think it matters. In the room were boxes or cartons which, it seems, were marked with names of corporations, one of which was FLIC and the others were of Ray controlled or dominated companies which were borrowers from FLIC. The boxes contained cancelled checks and bank statements. These were examined by Schutz and Moore. About five o'clock in the afternoon Sims stated that he had to lock up. Schutz and Moore left. On the following morning they reappeared and were informed by Sims that they could not see any records in the absence of Ray. Schutz and Moore departed.

Some days later, two weeks perhaps, Schutz returned to Monroe accompanying Stanley Levy, an investigator of S.B.A. The appellant J. D. Ray was at his FLIC office. FLIC records were further examined. Ray refused to permit examination of the books and records of the other companies. Levy then issued administrative subpoenas duces tecum to Ray for the production of books and records of the other companies. Application was made to the United States District Court for an order to require obedience to the subpoena. Testimony was taken. While the case was pending the United States brought an action against FLIC and Ray alleging a default in the discharge of the obligations of FLIC to S.B.A. and charging that funds had been wrongfully diverted to Ray. A money judgment, injunction and receivership were sought. A preliminary injunction was granted and a receiver was appointed.

The appointment of a receiver was affirmed. *First Louisiana Investment Corporation v. United States,* 5th Cir. 965, 35 F.2d 95. The receiver took possession of the books and records of FLIC. A Federal grand jury in the District of Columbia began an investigation of the operation of FLIC. The records in the possession of the receiver were made available to it and to the Department of Justice. An indictment against Ray, in seven counts, for mail fraud, in connection with the operation of FLIC, was returned by the grand jury in the District of Columbia. The proceeding for the enforcement of the administrative subpoenas duces tecum was dismissed as moot. Ray was convicted on all counts of the indictment. He was sentenced to fourteen months imprisonment on each of the first six counts, to run concurrently, with sentence suspended on the seventh count. Before us is the appeal from the conviction and sentence.

It is contended by the appellant that the examination of Schutz and Moore of June 7, 1963, was "a brazen and illegal search" made "in flagrant disregard of the rights guaranteed by the Fourth Amendment" and subsequent actions of S.B.A. to procure and make use of the "tainted fruit" of the wrongful search must be held to be violations of guaranteed rights and as unavailable for the procuring of an indictment and conviction. The district court did not pass upon the legality of the June 7, 1963 examination, but held that the evidence used was obtained by means independent of the June 7, 1963, examination.

The appellant opens his attack upon the examination of June 7, 1963, by quoting from the opinion of Mr. Justice Holmes in the *Silverthorne* case, the following:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them, that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L.R.A. 1915 B. 834, Ann. Cas. 1915C, 1117, to be sure, had established that having the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduced the Fourth Amendment to a form of words. 232 U.S. 393, 34 Sup. Ct. 341, 58 L.Ed. 652, L.R.A. 1915B. 834, Ann. Cas. 1915C 1177. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-392, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426.

The Government picks up where the brief of Ray purposefully leaves off, and the Government continues the quotation:

> ". . . this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. . . ." 251 U.S. 385, 392.

An unnamed Western judge has been quoted as saying that "A corporation has no pants to kick or soul to damn." Whether so or no, Silverthorne teaches that a soulless corporate entity may have as its home a castle in which it may defy the Crown and deny the Sovereign the right to cross its threshold. If he Silverthorne rule should be here controlling the Court would be required to decide whether the portion quoted by Ray is the applicable law or whether the guide is to be found in the portion excerpted by the Government. The situation here is different. FLIC was doing business under a Federal license and was conducting its business in large measure with Federal funds. In providing for such businesses as FLIC was authorized to conduct, Congress provided that the licensed corporations should be subject to examinations by S.B.A. examiners and a validly promulgated regulation permitted S.B.A. to determine the time and manner of conducting such examinations. Small business investment companies are regulated business enterprises. It seems to be well established that:

> "Where the government validly regulates any business, it has a right to include in its regulations that certain records be kept open to official inspection for the purpose of enabling the agency charged with the administration of such regulations to perform its functions, or of ascertaining whether an individual

> subject to such regulations is complying therewith, or of ascertaining other pertinent facts related to the regulation of such business; and the agency may be authorized to exercise this power regardless of whether the business involved is a public utility and regardless of whether there is any pre-existing probable cause for belief that there has been a violation of law." 79 C.J.S. 803. Searches and Seizures § 36.

"A corporation is chartered with special powers only. Its creator, the State, may examine into its records to see whether or not the privileges have been abused. Our dual form of government necessarily authorizes the United States to exercise these powers [of examination] in the vindication of its own laws." *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726-727, 64 S. Ct. 805, 88 L.Ed. 1024. See *United States v. Morton Salt Co.*, 388 U.S. 632, 70 S. Ct. 757, 94 L.Ed. 401; *Davis v United States*, 328 U.S. 582, 66 S. Ct. 1256, 90 L.Ed. 1453; *Cooper's Express, Inc v. I.C.C.*, 1st Cir 1964, 339 F.2d 338.

The S.B.A. examiners were in the valid exercise of their duties in making an examination of the books and records, and other papers of FLIC, on June 7, 1963. The right of the S.B.A. examiners to inspect books, records and papers of FLIC was not dependent upon the presence of Ray, its principal officer and principal stockholder. The existence of the right to make their examination was not contingent upon the data being in the office of the company. Whether the room in which the FLIC records were found was a part of the offices of FLIC or an office of its ac-

countants is immaterial for the purposes of our decision. The evidence would have justified an inference that the room was a part of the FLIC office. There was no breaking and entering of the room where the records were found. The door was open and the examination there of the FLIC records found there was proper.

A more serious question exists as to the validity of the examination of the records and documents of corporations which were controlled by Ray and used by him in illegal transactions with FLIC. These records and documents were found in the room with the FLIC records and, to some extent, were commingled with them. Although the point is doubtful, we assume that Ray is not precluded, by his contention that the records were in a room not occupied by FLIC, from asserting that the examination of such records was an invalid search. See 2 Wharton Criminal Evidence 12th Ed. § 700. It can be plausibly argued that the records of the other corporations; borrowers from FLIC and controlled by Ray, which were relevant to the examiners' investigation, were properly subjected to their search. *Cf. Abel v. United States,* 362 U.S. 217, 80 S. Ct. 683, 4 L.Ed. 2d 668, reh. den. 362 362 U.S. 984, 80 S. Ct. 1056, 4 L.Ed. 2d 1019. But aside from these considerations, it clearly appears from the data procured by the lawful examinaton of the FLIC records and documents that the other corporations were being used by Ray for the purpose of violating the law in the operation by him of FLIC. This being so, there was reasonable cause for requiring the production of the records of the other corporations. As noted in *Silverthorne Lumber Co v. United States, supra,* even if the facts disclosed by the records of the other corporations were

first disclosed by an unlawful search, they may nevertheless be proved if made known from an independent source. *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307.

The only ground asserted by the appellant for reversal of his conviction is that the examination of June 7, 1963, was an unlawful search and the tainted fruit of the search caused his indictment and conviction The trial court held the evidence admissible. We agree, although for a somewhat different reason than that of the district court. Its judgment is

AFFIRMED.

APPENDIX B

1.

SMALL BUSINESS INVESTMENT COMPANIES ACTS, TITLE III, SECTION 310 (15 USCA 687B)

"§ 687b. Investigations; power to subpena and take oaths and affirmations; aid of courts

The Administration may make such investigations as it deems necessary to determine whether a licensee or any other person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or or any rule or regulation under this chapter, or of any order issued under this chapter. The Administration shall permit any person to file with it a statement in writing, under oath or otherwise as the Administration shall deter-

mine, as to all facts and circumstances concerning the matter to be investigated. For the purpose of any investigation, the Administration is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpena issued to, any person, including a licensee, the Administration may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Administration, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Pub.L. 85-699, Title III, § 310, as added Pub.L. 87-341, § 9, Oct. 3, 1961, 75 Stat. 753."

2:

REGULATIONS GOVERNING SMALL BUSINESS INVESTMENT COMPANIES, PART II FEDERAL REGISTRY, PUBLISHED AUGUST 31, 1961 (Vol. 26 Fed. Reg. Sect. 107.801)

"§ 107.801 Examinations.

(a) Each Licensee shall be subject to examination by SBA.

(b) Such examinations shall cover any and all matters as determined by SBA, and shall be conducted by SBA examiners or by any examiners selected or approved by SBA.

(c) The cost of each examination made by other than SBA examiners shall be paid by the Licensee involved; and the cost of any examination made by SBA examiners, including the compensation of such examiners, may in the discretion of SBA, be assessed against the company examined, and when so assessed shall be paid by such company.

(d) The time and manner of conducting any such examination shall be determined by SBA in each case."

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266-436—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 103

LOUIS M. RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 374 F. 2d 638.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1967. The petition for a writ of certiorari was filed on April 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence obtained by grand jury subpoenas should have been suppressed because of a prior examination by agents of the Small Business Administration.

STATEMENT

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of seven counts of mail fraud, 18 U.S.C. 1341. On October 25, 1965, he was sentenced to fourteen months' imprisonment on each of six counts, the sentences to run concurrently, and to five years' probation on the seventh count, to be consecutive to the prison term.[1] The court of appeals affirmed (Pet. App. A).

The evidence (its sufficiency is not in issue) showed that petitioner in 1962 obtained a license from the Small Business Administration for his wholly owned company, the First Louisiana Investment Corporation, ("FLIC"), and thereafter received $450,000 in SBA loans and "matching" funds. Part of FLIC's purported initial capital was nonexistent; and subsequent increases in its capital—which the federal money was intended to "match"—resulted from bogus transactions in which FLIC would "lend" money to corporations controlled by petitioner and the money would be returned to FLIC as "new" capital via bank accounts also under petitioner's control.

1. During the course of the trial, petitioner's counsel made motions to suppress the evidence on the ground that it had been obtained as the result of an illegal search conducted by examiners of the SBA. A

[1] Petitioner was acquitted of three counts of making false statements.

transcript of a prior civil proceeding was introduced for the purpose of deciding the motions (R. 50).[2]

The evidence in the transcript and at the hearing revealed that when petitioner applied for a license for FLIC from the SBA, he submitted, as required by law, 15 U.S.C. 681(b), the Articles of Incorporation of FLIC to SBA for approval. Two of the Articles obligated FLIC (Tr. 464):

> (h) To conduct its operations in accordance with and subject to regulations prescribed by Small Business Administration * * * [a]nd
>
> (i) To submit to and pay for examinations made by direction of the Small Business Administration by examiners selected, employed or approved by Small Business Administration.

Petitioner represented in the license application that FLIC had at least $150,000 in unencumbered paid-in capital and surplus from private sources. An examination of FLIC in June 1962 by the SBA disclosed, however, that between January and April 1962 (both before and after FLIC received the license) petitioner withdrew the entire amount which had constituted FLIC's initial capitalization (Tr. 456–458, 475–476, 558).[3] In addition, FLIC had made loans to other corporations controlled by petitioner and these loans lacked adequate security and were in default; FLIC's

[2] "R." refers to the transcript of proceedings at trial. "Tr." refers to the transcript of the prior civil proceeding, *Small Business Administration* v. *Ray*, Civ. No. 9587 (W.D. La.), a copy of which has been lodged with the Clerk of this Court.

[3] Also—though not known to the SBA at the time—$60,000 of FLIC's ostensible $150,000 original capital was nonexistent—the result of a fictitious transaction between petitioner and one Crisler utilizing the intermediary of a "dummy" corporation controlled by petitioner (see R. 760–765).

fidelity bond had been revoked; and there were other violations of SBA regulations (Tr. 297). Petitioner, notified of these findings, submitted documents indicating that the money had been returned to FLIC, and he promised that he would try to obtain collateral for the loans and remedy his deficient bookkeeping practices. On the basis of petitioner's assurances SBA in November 1962 decided to continue FLIC as a licensee (Tr. 300–301, 476–477).

On June 3 or 4, 1963, one Schutz, an examiner for SBA, learned that another SBA licensee had in November 1962 loaned $110,000 to two companies controlled by petitioner and that at approximately the same time FLIC's capital had increased by $100,000 and FLIC had applied for matching loans from SBA (Tr. 299, 477–478, 485, 486, 488–489). Schutz wrote a memorandum on June 5, 1963, setting forth the facts regarding FLIC known to the SBA at the time and recommending a full examination of FLIC's activities. In his memorandum he stated (Tr. 491–492):

> In view of our past experience with Mr. Ray and [FLIC], this examiner believes there is a strong possibility that the funds obtained by Charmingdale Bus and Realty Construction [the two companies which petitioner controlled] may have been channeled into [FLIC] some time between October 1, 1962 and December 31, 1962, so as to increase the licensee's paid-in capital and surplus to the tune of $100,000.
>
> The wholly owned business activities of Louis Ray lend themselves to a pyramiding operation which the timing of loans to Charmingdale Bus

Company and Realty Construction and the increase in Licensee's paid-in capital confirm.

Permission to conduct an examination of FLIC was immediately granted.

On June 6, 1963, Schutz went to Monroe, Louisiana, where the offices of FLIC were located. The agency (and Schutz) knew from financial statements on file at the SBA that several companies listed as borrowers from FLIC appeared also to have their headquarters in Monroe (see Tr. 321–325). Schutz was unable to find the companies mentioned on the tax rolls. Nor could he find addresses for them in the telephone directory. On the morning of June 7, 1963, he proceeded to the local courthouse and examined the charters of the companies. He learned that two of the borrower corporations had been organized only two days before receiving $100,000 loans from FLIC; that their articles of incorporation had not been filed until after the loans had been made; that the incorporators and stockholder-officers were the same for both corporations; that the addresses and principal offices of the companies were either that of petitioner's attorney or a former address of FLIC itself; and that employees of petitioner were among the incorporators, officers and shareholders of the companies (Tr. 495–497, 500–504).

In the afternoon of June 7, Schutz and a subordinate named Moore went to the offices of FLIC. The examiners entered the building and first encountered one Hathaway to whom they identified themselves and told of their purpose to inspect FLIC's records (Tr. 212, 508). Hathaway left to get one Sims, an

employee of FLIC. While he was gone Schutz walked down a corridor and glanced through an open door. He saw what appeared to be journals and ledgers lying on the floor near a desk (Tr. 508, 510). He walked back and met Sims. Sims said that he would have to telephone petitioner, who was in Florida; he had no authority himself to let the men look at the records (R. 371; Tr. 101, 511–512, 514). Sims telephoned petitioner and put Schutz on the line. Schutz told petitioner he was from the SBA and would like to examine FLIC's records (Tr. 20, 514). Petitioner told Schutz that he could not see the records at that time because they were locked up and he and his other employees who had keys were with him in Florida. He indicated that he would be glad to let the agents examine the records when he returned in about a week (Tr. 20–21, 26, 380, 516, 542–544). Sims testified that when petitioner had finished speaking to Schutz, petitioner flatly instructed Sims not to let the examiners look at the records (Tr. 22–23, 41, 129, 163; but see Tr. 192).

After concluding the conversation with petitioner, Schutz noticed that the door of the safe in the room was ajar and the safe empty (Tr. 516–517, 595, 597). Believing that petitioner had lied or was mistaken about the records being locked up, he asked Sims, "Do you mind if we look around?" (Tr. 517, 550). According to both Schutz and Moore, Sims' response to this question was to shrug his shoulders as if he "didn't care" (Tr. 517, 550, 597). The agents proceeded to the room where Schutz had seen the records

when he first came in (Tr. 517–518).[4] Sims entered the room a few minutes later (Tr. 552). Schutz again inquired whether he minded if they looked at the records. Sims again shrugged (Tr. 519). According to the examiners, he never objected to their inspection (Tr. 519, 528, 600). Sims, however, testified that he told the agents that they could not see the records, and ordered them to stop (R. 37–38; Tr. 104–107, 130). The agents examined cancelled checks of FLIC and of several corporations that were borrowers from FLIC (Tr. 317–325, 437–439). The names of the borrower companies whose checks the agents examined (*e.g.* Holiday Hotel, Trends Builders, Louisiana Brick, Consolidated Contractors, Rapides Land, U.S. Engineering) were in all cases known to the SBA from statements filed with the SBA by petitioner showing transactions of FLIC with these companies (Tr. 317–325, 437–439, 574). The checks were in boxes on the floor, with pieces of paper separating checks belonging to different companies (Tr. 126, 282–283, 575–576). Sims stayed in the room and watched the agents make their examination (Tr. 520–521). The agents remained at the premises from 2:00 p.m. to 5:00 p.m. when they were asked by Sims to leave since Sims himself had to go (Tr. 525–526).

The agents came back the next morning to resume their examination but Sims refused to let them enter, saying that he had spoken to petitioner in the mean-

[4] This room was actually the office of petitioner's accountant, but there was nothing to indicate that it was not part of the FLIC premises (Tr. 56–57, 195).

time and that petitioner had told him not to admit them (Tr. 110, 529). Schutz and Moore thereupon left.

On June 17, after petitioner had returned from Florida, Schutz and one Levy conducted a full examination of FLIC's records with petitioner's permission (Tr. 28–29, 311–312). Petitioner did not at that time indicate any objection to the June 7 inspection (Tr. 312).

The SBA subsequently served subpoenas on petitioner requiring production of the records of the borrower corporations of FLIC known to be controlled by him (Tr. 319–325). Petitioner did not comply with the subpoenas and an enforcement proceeding was instituted in the federal district court.[5] While the case was pending, the United States brought suit against petitioner and FLIC, alleging that FLIC's obligations to the SBA were delinquent and that petitioner had wrongfully diverted SBA funds. A receiver appointed by the district court took possession of the FLIC books and records and placed the documents in the custody of the court. Some time later, the government presented to a grand jury in the District of Columbia evidence which resulted in the mail fraud indictment in the present case. A grand jury subpoena duces tecum was issued to the Clerk of the Louisiana District Court for the FLIC records in its custody and on July 10, 1964, by order of the district judge, the records were turned over to the grand jury. The subsequent prosecution in the District of Columbia was transferred to the Western

[5] The transcript of this proceeding contains the testimony concerning the circumstances of the June 7 examination and is the one that was admitted into evidence at petitioner's trial.

District of Louisiana. *United States* v. *Ray*, 234 F.Supp. 371 (D.D.C.).

2. The district court found it unnecessary to determine whether the inspection by Schutz and Moore on June 7, 1963, had been proper, since it found that the government had sufficient independent knowledge of petitioner's and FLIC's activities to justify the subpoena of FLIC's records in connection with the grand jury investigation (R. 41). The court of appeals ruled that the June 7 inspection by SBA examiners of the records of FLIC was valid notwithstanding the fact that petitioner refused to permit the examination, since the right of SBA examiners to see the records, where no breaking or entering was involved, did not depend on the presence or then consent of petitioner. As to the records of the corporate borrowers from FLIC, the court found that the data procured by lawful examination of the FLIC records provided sufficient independent ground for requiring the production of such records whether or not the examination of the records of the borrowers on June 7 had been justified.

ARGUMENT

The question in this case is whether the subpoenaed records were inadmissible in petitioner's criminal trial as the fruit of the June 7 inspection. We submit not. First, they had an independent source. Second, the June 7 inspection was lawful.

1. The record clearly establishes, as the district court found, that before the June 7 examination of the books and records SBA had sufficient information

of wrongdoing by FLIC and misuse of the borrower corporations that there would have been an investigation of petitioner and FLIC, and subpoenas to the borrower corporations, whether or not the June 7 examination had taken place. Schutz testified that the facts obtained from the June 7 inspection were "repetitious" of information already in the SBA's files and merely "confirmed" prior suspicions regarding petitioner's unlawful conduct (R. 64, 66, 68; Tr. 439, 578–579). The facts set forth in the statement fully support these assertions. Briefly to summarize: Following the initial near-cancellation of FLIC's SBA license in November 1962 for various breaches of SBA regulations, SBA learned on June 3 or 4, 1963, that FLIC's capital had increased by $100,000 at a time when two companies controlled by petitioner had received loans of approximately that amount from another SBA licensee. Before the June 7 inspection Schutz had also learned from the charters of various borrower corporations of FLIC that these corporations were organized and controlled by petitioner apparently for the sole purpose of acting as recipients of alleged "investments" by FLIC. The existence of all of the borrower corporations whose checks were observed on June 7 was known to the SBA from statements filed by petitioner for FLIC showing transactions with such companies. Moreover, after the June 7 examination, there was an examination of FLIC records with petitioner's consent on June 17. These records also disclosed the existence of the borrower corporation and the need to examine their records.

2. Petitioner's challenge to the legality of the June 7 examination overlooks the fact that the articles of incorporation of FLIC included a consent to examination of its books and records by the SBA. The company was organized for the sole purpose of doing business under the auspices of and with funds contributed by the SBA. The provision in its charter consenting to inspections by SBA examiners was a reasonable condition of the agency's licensing such an operation. In these circumstances, SBA agents did not need the express consent of any representative of the corporation to examine the records. See *Zap* v. *United States,* 328 U.S. 624, vacated on other grounds, 330 U.S. 800.[6] Nor is it clear that consent was in fact withheld. Petitioner's own testimony indicates that he told the examiners that the records could not be examined because they were locked up and no one then on the premises had the key. When the examiners saw that the records were in fact open to view, they had every right to rely upon the corporate consent given in the articles of incorporation as grounds for inspection of the records.[7]

[6] We do not suggest that the agents would have been justified in making a forcible entry in the face of an attempt to bar them; but nothing of that sort happened here. When on June 8 Sims declined to admit the agents, they did not enter.

[7] Nor is it clear that petitioner has standing to challenge the inspection of records of FLIC and of the borrower corporations. Several cases have held that an individual who chooses the corporate form of transacting business may not repudiate the separate corporate identity in order to complain that papers of the corporation are "his" when used against him in a criminal trial. *E.g.*, *Lagow* v. *United States*, 159 F. 2d 245 (C.A. 2), certiorari denied, 331 U.S. 858; *United States* v.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1967.

H. J. K. Theatre Corp., 236 F. 2d 502 (C.A. 2), certiorari denied *sub nom. Rosenblum* v. *United States*, 352 U.S. 969; *United States* v. *Culver*, 224 F. Supp. 419, 427–429 (D. Md.). *Henzel* v. *United States*, 296 F. 2d 650 (C.A. 5), looks the other way, but may be distinguished as involving the seizure of corporate records from the private office of the corporation's president and sole stockholder.

U.S. GOVERNMENT PRINTING OFFICE: 1967